Originalism and Ancestor Worship in the Post-Heroic Era: The Dred Scott Opinions

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under the reign of little Men - a pygmy race
& that the sages of the last age are extinguished."¹

INTRODUCTION

Why commemorate with a symposium one of the most infamous of all decisions of the United States Supreme Court?² Its most loathsome holding was overruled a decade later by

¹ Letter from Chancellor James Kent to Justice Joseph Story (June 23, 1837), written upon the issuance of Taney's first opinion as Chief Justice and describing Kent's poor opinion of Taney. In it, Kent asked Story to keep Kent's negative opinion of Taney in confidence. It appears that William Story, his father's literary executor, also honored that request. He published only a portion of this letter in 2 LIFE AND LETTERS OF JOSEPH STORY, at 270-71 (William W. Story ed., 1851). The quote used herein as the epigraph was omitted from the published version of the letter. A copy of the complete manuscript is on file with the Widener Law Journal and the Charleston School of Law, Sol Blatt Library. Story shared Kent's views of Taney. See GERALD T. DUNNE, JUSTICE JOSEPH STORY AND THE RISE OF THE SUPREME COURT (1970) (especially ch. 27); 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 10, 28-29 (1937); WARREN, supra note 1, at 1-38 (discussing the general apprehension which surrounded the appointment of Taney and examining the reaction to Taney's early decisions as Chief Justice); Louis B. Boudin, John Marshall and Roger B. Taney, 24 GEO. L. J. 864, 887-95 (1936); Robert E. Mensel, "Privilege Against Public Right: A Reappraisal of the Charles River Bridge Case," 33 DUQ. L. REV. 1, 3-5 (1994); William L. Ransom, Roger Brooke Taney: Chief Justice of the Supreme Court of the United States (1836-1864), 24 GEO. L. J. 809, 815-16 (1936).

constitutional amendment. Its other principal holding has been rendered irrelevant by legislative repeal and by the passage of time. It is an indelible stain on the Jacksonian constitutional jurisprudence of the fifth Chief Justice, Roger B. Taney, and on his personal fame. No right-thinking person takes it seriously anymore, except as a convenient object of derision. What is left to be learned from this abhorrent and abominable decision?

One of the few comments that can be made without controversy about the Supreme Court's opinion in *Dred Scott v. Sandford* is that it is a profoundly originalist opinion. According to the Chief Justice, the Constitution "speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people." And while originalism is not a monolithic approach to constitutional interpretation, any judicial opinion decided on Taney's premise surely qualifies as originalist.

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3 The Court held that Scott, as a person of African heritage, could not be a citizen "within the meaning of the Constitution of the United States." *Dred Scott*, 60 U.S. at 426-27. This was overruled by the Fourteenth Amendment. U.S. CONST. amend. XIV, § 1.

4 The Court's second principal holding in *Dred Scott* was that the section of the Missouri Compromise of 1820, ch. 22, § 8, 3 Stat. 545 (1820), that outlawed slavery in a portion of the Louisiana Territory was unconstitutional. *Dred Scott*, 60 U.S. at 452. That section had already been repealed by the Kansas-Nebraska Act, 10 Stat. 277 (1854). Its constitutionality was arguably before the Court because the right to freedom Scott asserted vested under the Missouri Compromise, if at all, before the repeal. *Dred Scott*, 60 U.S. at 431.

5 60 U.S. (19 How.) 393 (1857).

6 Two scholars have defined "originalists" as "those who maintain that constitutional interpretation should be constrained by the 'original intent' of the Framers, the 'original understanding' of the Ratifiers, or the hypothesized, objective 'original meaning' of the Constitution's text." Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L. J. 1113, 1127 (2003).

7 *Dred Scott*, 60 U.S. at 426.

8 The literature discussing originalism is vast and varied. For just a few examples, see, e.g., ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990) (discussing the validity of original understanding interpretation, the arguments for and against its use, and concluding that a constitutional interpretation theory cannot succeed if it calls for a departure from the original); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997) (discussing and
The peculiarly narrow originalism of the *Dred Scott* opinion arose in a complex historical context, lost to law office history and not elsewhere considered in relation to *Dred Scott*. That context drove both Chief Justice Taney and his principal antagonist, Justice Benjamin Curtis, to turn to their ideas about the original meaning and intent of the Constitution and its historical context to answer "questions...of the highest importance" presented by the case.

In this article, I explore one aspect of the cultural context of the period from ratification to the Civil War. Synthesizing important historiographical work done on that period, I offer an explanation for what in another context might seem to be a remarkable fact. In 1857, the majority of the justices of the Supreme Court, like other opinion leaders of the 1850s, felt the need to refer to and rely upon the historical context of the 1780s in their attempts to resolve issues arising from slavery. I attempt to explain the underlying cultural reasons for that backward-looking reference. To this extent, this article is not classic legal scholarship.

critiquing numerous methods of constitutional interpretation); Bret Boyce, *Originalism and the Fourteenth Amendment*, 33 WAKE FOREST L. REV. 909 (1998) (arguing that the "common-law approach to constitutional adjudication provides far broader and more determinate protection than originalism for individual rights and democratic institutions"); Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV., November 1984, at 1, 1 (examining whether "the sole source of law for judicial review" should be only the constitutional text or the "precedent, practice, and conventional morality" in addition); Kesavan & Stokes, *supra* note 6 (advocating an approach the authors' term "originalist textualism" as the "true" method of constitutional interpretation" and examining "the admissibility, reliability, and relative weight of various extrinsic" sources that can be used to give the words and phrases in the text of the Constitution their original meaning, that is at the time the Constitution was drafted); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV., 1984-1985, at 885 (examining whether "the framers of the Constitution expected later interpreters to [determine] the meaning of the [text] through the framers' intent").

9 I do not mean to suggest that the Chief Justice, for the majority, and Justice Curtis, in dissent, adopted precisely the same methodology. In my view, they are different, but Justice Curtis' methodology nevertheless may be characterized as a type of originalism. See discussion, infra.

10 *Dred Scott*, 60 U.S. at 399.
as much as it is an attempt at a cultural study, or perhaps an anthropology of law,\(^{11}\) using Dred Scott as an illustration.

The methodology herein is based on two related assumptions. The first was best articulated by the cultural historian Stephen Kern, who wrote that "any generalization about the thinking of an age is the more persuasive the greater the conceptual distance between the sources on which it is based."\(^{12}\) My analysis is based on case law, political commentary of various types, and both fiction and non-fiction literature. The second assumption, more widely held but still worth articulating explicitly, was described by the legal historian Thomas Grey:

The rhetoric used by successful politicians and advocates tends to indicate the dominant belief-structure of their audience, whether or not that conscious belief-structure was the primary causal force on the audience's behavior. Otis, Dickinson, John and Samuel Adams, Jefferson, and other leaders of the struggle for independence were successful politicians and advocates. There must be a very strong presumption that the arguments they used rested on widely shared beliefs and invoked widely shared values.\(^{13}\)

And to Grey's list of revolution-era notables I would add such mid-century notables as Roger Taney, John Quincy Adams, Benjamin Robbins Curtis, John McLean, and others cited herein. As Grey's work implicitly acknowledges, however, cultures are never monoliths.\(^{14}\) Widely shared beliefs are not universally shared beliefs. Dissenting voices can always be found, and sometimes they provide an important perspective.\(^{15}\) Even so, a culture may be understood to a great extent based on the preponderance of thought


\(^{14}\) See id. at 847.

\(^{15}\) See the discussion of Justice McLean's dissenting opinion in Dred Scott, infra note 96.
and feeling on a particular subject within that culture, and that is part of the project here.

What appears from the historical record, examined under this peculiar microscope, is an image of a generation genuflecting to the "Founding Fathers": the Revolutionary generation whose members were the metaphorical fathers, and, in many cases, the actual fathers of prominent members of the Civil War generation. The latter generation, thinking themselves a poor substitute for "the sages of the last age," were unwilling to apply the constitutional philosophy of the Fathers to the pressing constitutional issue of the time. Instead, the filial generation both venerated and cleaved to the text. In so doing, they effectively referred to the Fathers the same problem the Fathers had bequeathed to the sons: the problem of slavery. The originalism of Taney's opinion, and of his generation, was a flight from the most vexing political problem of the day to a halcyon past when greater men were available to solve fundamental political problems. It was based on an inclination towards, and was an instance of, ancestor worship.  

THE BACKGROUND OF THE CASE

As many historians and legal scholars have noted, the Dred Scott litigation started as one small part of the agitation against

\[\text{References:}\]

16 Letter from Chancellor James Kent to Justice Joseph Story, supra note 1.
17 See Letter from Chancellor James Kent to Justice Joseph Story, supra note 1.
18 See id.
19 Other scholars have also suggested that originalism is a form of ancestor worship. See Michael Kirby, Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?, 24 MELB. U. L. REV. 1 (2000) at 1-2 (examining the use of originalism by courts in the United States to interpret the United States Constitution and rejecting an originalist approach to interpreting the Australian Constitution because originalism is a form of ancestor worship). These suggestions appear to have been made with the intent of disparaging, rather than understanding, the phenomenon. See, e.g., id. at 1, 6. No one, to my knowledge, has tied the assertion to the historical record in quite the manner set forth herein.
20 See generally Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (holding that African Americans are not citizens under the Constitution); Scott
slavery mounted by anti-slavery interests with strong support in the North.\textsuperscript{21} Scott was the slave of an army surgeon, Dr. John Emerson.\textsuperscript{22} Emerson took Scott to live with him in Illinois, a free state, and then in Upper Louisiana, a free territory.\textsuperscript{23} Scott lived in each place for a time sufficient to work his manumission.\textsuperscript{24} After their return to Missouri, a slave state, Scott sued Emerson's administratrix for his freedom and that of his family.\textsuperscript{25} Scott sued first in state court in Missouri.\textsuperscript{26} The state court action was brought with some justifiable confidence because it had for decades been the law in Missouri that a slave brought voluntarily to a free state or territory was thereby manumitted. Manumission in such cases remained effective even after return to Missouri.\textsuperscript{27} Bound by this line of authority, the trial court ordered Scott and his family freed.\textsuperscript{28} The Supreme Court of Missouri reversed the lower court and overruled the earlier line of authority.\textsuperscript{29} Its opinion was part of a general reaction by Southern and national institutions controlled by Southerners against the increasing influence and vitriol of Northern abolitionists.\textsuperscript{30}

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\textsuperscript{22} Dred Scott, 60 U.S. at 397.
\textsuperscript{23} \textit{Id.} at 397-98.
\textsuperscript{24} Emerson, 15 Mo. at 582.
\textsuperscript{25} \textit{Id.}
\textsuperscript{26} Dred Scott, 60 U.S. at 453.
\textsuperscript{27} See Wilson v. Melvin, 4 Mo. 592, 598-99 (1837); Nat v. Ruddle, 3 Mo. 400, 401-02 (1834); Ralph v. Duncan, 3 Mo. 194, 196-97 (1833); Winny v. Whitesides, 1 Mo. 472, 476 (1824).
\textsuperscript{28} Emerson, 15 Mo. at 582.
\textsuperscript{29} \textit{Id.} at 582-87 (overruling Wilson v. Melvin, 4 Mo. 592, 598-99 (1837); Nat v. Ruddle, 3 Mo. 400, 401-02 (1834); Ralph v. Duncan, 3 Mo. 194, 196-97 (1833); Winny v. Whitesides, 1 Mo. 472, 476 (1824)).
Times now are not as they were when the former decisions on this subject were made. Since then not only individuals but States have been possessed with a dark and fell spirit in relation to slavery, whose gratification is sought in the pursuit of measures, whose inevitable consequence must be the overthrow and destruction of our government.  

After the loss in state court, Scott's attorneys filed a similar action in a federal trial court, which Scott also lost.  

Chief Justice Taney's opinion in *Dred Scott* has justly been condemned as the nadir of American constitutional jurisprudence.  

It is reviled today for many reasons. Among them is the fact that in it Taney expressly endorsed the "absolute and despotic power" of the white race over the black race and noted, as if in the capacity of a mere observer, "the degraded condition of this unhappy race."  

Taney's opinion dashed the hopes of every American of African descent of having legal status before the law. It held that individual persons of African descent "had no rights which the white man was bound to respect," that the political community that created the federal republic excluded from its inception all persons of African descent, and, finally, that respect

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31 *Emerson*, 15 Mo. at 586.
32 *Dred Scott*, 60 U.S. at 396, 400.
33 *Id.* at 399.
34 One commentator has expressed some doubt as to whether Taney's opinion ought properly to be regarded as the opinion of the majority of the Court. MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* 19 & n.29 (2006). Taney explicitly wrote that it was so, *Dred Scott*, 60 U.S. at 400, and Justices Wayne, *Dred Scott*, 60 U.S. at 454 (Wayne, J., concurring), and Curtis, *Dred Scott*, 60 U.S. at 564, 588 (Curtis, J., dissenting), acknowledged it as such. Professor Graber's comment echoes some contemporary criticisms of the opinion. GRABER, supra note 34 and sources cited therein.
35 *Dred Scott*, 60 U.S. at 409.
36 *Id.*
37 *Id.* at 407.
38 *Id.* at 404-05.
for state sovereignty required the Court to assume that the most
vicious of racist doctrines must have some basis in fact.\textsuperscript{39}

The opinion was reviled by its contemporaries for somewhat
different reasons. Many thoughtful Americans had feared for years
that the North and South could not continue in the Union without
the culture and economy of one overcoming and dominating the
other.\textsuperscript{40} The abiding concern in the South had been that Northern
culture and ideology would invade the South and exterminate
slavery and Southern institutions based on the model of slavery.\textsuperscript{41}
Southerners feared "the extension of the evils of free society to
new people and coming generations."\textsuperscript{42} This is the concern
adverted to in the state court's opinion quoted above.\textsuperscript{43}

Taney's opinion turned the tables. First, Tancý made it clear
that slavery might extend to all federal territories then remaining
territories in 1857, or any territories later acquired.\textsuperscript{44} To the extent
that national expansion continued, therefore, slavery might still
expand. Taney did not explicitly answer the two questions
obviously raised by that aspect of the decision: First, what would
be the status of slavery in such territories after they should become
states, particularly should they seek to become free states? Second,
would the Fifth Amendment Due Process Clause finally be applied
as a matter of federal constitutional law to the actions of the
states?\textsuperscript{45} One possible answer to this latter question raised, for the
first time, the possibility that Southern culture and ideology might

\textsuperscript{39} \textit{Dred Scott}, 60 U.S. at 416.
\textsuperscript{40} \textit{Foner}, supra note 21, at 312-17.
\textsuperscript{41} \textit{Id}. at 312.
\textsuperscript{42} \textit{Id}. (quoting \textit{Shall Labor Be Owned Or Hired?}, NORTH AMERICAN AND
UNITED STATES GAZETTE (Phila.), Sept. 25, 1856).
\textsuperscript{43} \textit{See supra} note 34 and accompanying text.
\textsuperscript{44} \textit{Dred Scott}, 60 U.S. at 450-52.
\textsuperscript{45} This argument had been rejected by the Court twenty-four years earlier
in \textit{Barron v. Mayor of Balt.}, 32 U.S. (7 Pet.) 243, 250-51 (1833). It was not
squarely presented to the Court in \textit{Dred Scott}, but the possibility could not have
been far from the minds of informed observers of the Court. \textit{See, e.g., Dred
Scott}, 60 U.S. at 627 (McLean, J., dissenting); \textit{see also Foner, supra} note 21, at
96-98.
invade the North under protection of the Constitution. This, together with many other factors, heightened fears, hardened political and moral positions, and contributed to the conflagration that followed. This was the reason for much of the contemporary criticism of the opinion.

THE ANTEBELLUM OR THE POST-HEROIC ERA?

In order to appreciate the case in its own context, one must review the historical record not backward from the present to 1857, but forward from 1787 to 1857. The simple fact of the Civil War makes this an exercise that requires a bit of historical discipline. The Civil War was an event of such magnitude that it both changed the course of the future and re-characterized the past. The period immediately before the Civil War came later to be known as the Antebellum Era. But to the people who lived in that period and struggled to preserve the Union, the era was not antebellum, but post-heroic.

The cultural historian George Fording made explicit the obvious when he wrote, "The leaders of American politics and culture in the middle decades of the nineteenth century belonged to a generation that was born and socialized in the early Republic, when the memory of the Revolution was still fresh and the founding heroes still held political power." This fact shaped their experience and identities, and to a great extent determined their conduct in the era preceding the Civil War.

The greatest of all the many difficulties the Founding Fathers bequeathed to their political progeny was the problem of slavery. The Fathers left a historical record that revealed their ambivalence

46 Foner, supra note 21, at 97-102; George B. Fording, Patricide in the House Divided: A Psychological Interpretation of Lincoln and His Age 153-54 (1979); see Dred Scott, 60 U.S. at 559 (McLean, J., dissenting).
47 See Fording, supra note 46, at 136-40.
48 Fording, supra note 46, at 6-12. Fording argues, throughout his book, that the post-heroic mentality "provides a key to understanding more clearly not only the mentality of mid-century leadership but also the structure and style of the long struggle to preserve the Union and hence the origins of the American Civil War." Id. at 3.
49 Id. at 3.
50 Id.
about the South's peculiar institution, inasmuch as they generally reviled it personally, but accepted it as a political expedient necessary to unify all thirteen states into one more powerful union.\textsuperscript{51} Their language of condemnation is peculiarly religious in tone and forecasts both political and moral difficulty ahead.\textsuperscript{52} John Jay, one of the authors of the \textit{Federalist Papers}, wrote, "That men should pray and fight for their own freedom, and yet keep others in slavery, is certainly acting a very inconsistent, as well as unjust and, perhaps, impious part."\textsuperscript{53} The Virginia cleric Peter Fontaine referred to slavery as "the original sin and curse of the country."\textsuperscript{54} Expressing a sentiment strikingly similar to that expressed by Abraham Lincoln in his Second Inaugural Address, Luther Martin,\textsuperscript{55} who otherwise disagreed vehemently with Jay, stated:

[...] It ought to be considered, that national crimes can only be, and frequently are, punished in this world by national punishments; and that the continuance of the slave trade, and thus giving it a national \textit{sanction and encouragement}, ought to be considered as justly exposing us to the displeasure and vengeance of Him who is equally Lord of all, and who views with equal eye the poor African slave and his American master.\textsuperscript{56}

\textsuperscript{51} \textsc{Bernard Bailyn, The Ideological Origins of the American Revolution} 232-46 (1967); \textsc{Edmund S. Morgan, American Slavery, American Freedom: The Ordeal of Colonial Virginia} 375-77 (1975).
\textsuperscript{52} See \textsc{Bailyn, supra} note 51, at 237-41.
\textsuperscript{55} Martin was a delegate to the Constitutional Convention who opposed the Constitution and refused to sign it. He was also an anti-ratification delegate to the Maryland ratification convention. \textit{See infra} note 57.
\textsuperscript{56} \textit{1 The Debates in the Several State Conventions on the Adoption of the Federal Constitution} 374 (Jonathan Elliot ed., 1888). Compare Lincoln's Second Inaugural Address:

\text Quotes...
Thomas Jefferson is the Founding Father most often cited to support the assertion that the Fathers were aware of the hypocrisy of the constitutional resolution of the issue of slavery.\textsuperscript{57} In his \textit{Notes on the State of Virginia}, Jefferson wrote:

[W]ith what execration should the statesmen be loaded, who permit[,] one half the citizens thus to trample on the rights of the other . . . . And can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the gift of God? That they are not to be violated but with his wrath? Indeed I tremble for my country when I reflect that God is just: that his justice cannot sleep forever . . . .\textsuperscript{58}

In the balance, there can be no doubt that the majority of the Fathers recognized the iniquity of the compromise that brought the Southern states into the Union and left it for a later generation to reach a more just disposition of the issue of slavery.\textsuperscript{59}

Even with that weighty issue pending, the young republic saw fantastic growth and substantial change in the first sixty years of the nineteenth century. The Transportation Revolution and the Market Revolution fed one another, and together worked something of a political revolution in conceptions of the relationship between government and commerce.\textsuperscript{60}

attributes which the believers in a Living God always ascribe to Him? . . .

[A]s was said three thousand years ago, so still it must be said "the judgments of the Lord, are true and righteous altogether."

\textit{Abraham Lincoln (Mar. 4, 1865), in LINCOLN, SELECTED SPEECHES AND WRITINGS 450 (Library of Am. ed., 1992).}


\textsuperscript{58} THOMAS JEFFERSON, \textit{NOTES ON THE STATE OF VIRGINIA} 155-56 (The Univ. of N. C. Press 1954) (1785).

\textsuperscript{59} GRABER, \textit{supra} note 34, at 106-09.

\textsuperscript{60} CHARLES SELLERS, \textit{THE MARKET REVOLUTION: JACKSONIAN AMERICA, 1815-1846} (1991), is the leading text on the rise of the market economy and the change in its relation to government in this period. On the Transportation Revolution, see generally EDWARD PESSEN, \textit{JACKSONIAN AMERICA: SOCIETY, PERSONALITY, AND POLITICS} 101-48 (Univ. of Ill. Press 1985) (1969)
contract was modified to facilitate commerce at the cost of a concomitant facilitation of fraud that was not comprehensively addressed until the Progressive Era.

In addition, as the legal historian Paul W. Kahn has shown, a substantial ideological change in the understanding of the constitutional moment also took place. Kahn argues that at the moment of national consent when the Constitution was ratified, consent was given not only to the Constitution as a text and as a


63 Paul W. Kahn, Reason and Will in the Origins of American Constitutionalism, 98 YALE L.J. 449, 449-52 (1989). Reason and will, together with sentiment, were the three "faculties" of the human mind, according to the dominant theory of the mind in the late eighteenth and nineteenth centuries, known as faculty psychology. For a thorough discussion of faculty psychology and its relation to the law, see Robert E. Mensel, Right Feeling and Knowing Right: Insanity in Testators and Criminals in Nineteenth Century American Law, 58 OKLA. L. REV. 397, 403-06 (2005) and sources cited therein.
metaphorical edifice of government, but also to the science of politics that gave shape to the edifice.\textsuperscript{64} But by 1857, according to Kahn, the science of politics had vanished from public and judicial view, and the moment of consent was conceived only as consent to the constitutional structure itself.\textsuperscript{65} The text and its meaning in 1787 or 1789 were the legacy of the Fathers. Legitimacy in constitutional interpretation depended upon conformity to that legacy, not the underlying theory.\textsuperscript{66}

Kahn traces this process in great depth up to \textit{Dred Scott}, but does not undertake to explain the deeper reasons for the abandonment of the science of politics. Perhaps that explanation lies, in part, in Forgie's work.\textsuperscript{67} Forgie's analytic gambit is to examine the relationship between the Revolutionary generation and the generation immediately following it as a relationship between a father and a son.\textsuperscript{68} His approach is unabashedly psychoanalytic, and his sources are primarily the speeches and writings of the filial generation.\textsuperscript{69}

According to Forgie's analysis, the Post-Heroic Era began on July 4, 1826, precisely fifty years after the signing of the Declaration of Independence, with the spectacular coincidence of the deaths of Thomas Jefferson and John Adams on that day.\textsuperscript{70} It reached the judiciary on July 6, 1835, with the death of Chief Justice John Marshall.\textsuperscript{71} The practice of memorializing the Founding Fathers in literature that was little more than hagiography was already well-established by the time of Marshall's death. It had begun shortly after the death of George Washington in 1799.\textsuperscript{72} In Washington's case, mere sainthood was insufficient, and a tradition of Washington apotheoses arose.\textsuperscript{73} This was not

\textsuperscript{64} Kahn, \textit{supra} note 63, at 450, 462-74.
\textsuperscript{65} Id. at 450, 494.
\textsuperscript{66} Id. at 497-98.
\textsuperscript{67} FORGIE, \textit{supra} note 46.
\textsuperscript{68} See id. at 6-12.
\textsuperscript{69} See id. at 193-95, 213-15.
\textsuperscript{70} Id. at 52-53.
\textsuperscript{71} Mensel, \textit{supra} note 1, at 4.
\textsuperscript{72} See FORGIE, \textit{supra} note 46, at 26-31, 44-45.
\textsuperscript{73} For a discussion of the tradition of Washington hagiography, see W\textsc{illiam Alfred B\textsc{ryan}}, \textsc{George Washington in American Literature}, 1775-1865, at 86-120 (1952). Chief Justice John Marshall himself wrote one of
limited to popular literature penned by hack hagiographers. Even James Fenimore Cooper participated in it. In one incident in Cooper's novel, *The Spy,* Washington, radiating all his personal stature and dignity, addresses a patriotic young woman as his "child" and refers to all the people of his land as his children: "[Y]ou are my child: all who dwell in this broad land are my children, and my care." He then lays his hand upon her head and blesses her.

The image of a god-like "Father of Our Country" in the post-heroic mind epitomizes the filial generation's feeling for the revolutionary generation: they were both gods and fathers. Surely Forgie is on the right track taking a psychoanalytic approach to this filial perspective on the fathers, and Washington in particular. This is most vividly demonstrated by the priapic megalith erected to reassure his political progeny of his eternal power and presence, construction of which began in 1848.

Forgie demonstrates that the post-heroic generation was raised with specific admonitions that they should emulate the Founding


75 *Id.* For a more detailed discussion of this novel, see FORGIE, *supra* note 46, at 218-25.
76 See *id.* at 367.
77 *Id.*
Fathers. How this ought to be done was not, on the face of it, entirely obvious. Would one best emulate the Fathers by being, as they were, revolutionaries? Would one best emulate them by adopting and developing their science of politics, as Kahn characterizes it? Or would one best demonstrate one's filial piety by preserving the republican edifice erected by the Fathers without inquiring too deeply into its political architecture?

To many in the Post-Heroic Era, the greatness of the Fathers implied a declension in the transition of generations. It was the topic of considerable commentary in the literature of the period. "[W]hat a graduated line of still diminishing shadows have glided successively through the portals of the White House," Edmund Quincy marveled, and so spoke for many others. The sense of declension was particularly acute in the law. On hearing of Taney's ascension to the chief magistracy, Chancellor James Kent summarized this feeling in a letter to Justice Joseph Story in the following words: "[N]ow we sadly realize that we are to be under the reign of little Men - a pygmy race & that the sages of the last age are extinguished."

The post-heroic generation faced two significant problems. The first was to preserve the patrimony that was the republic. The famous orator Edward Everett expressed both the goals and anxieties of the sons when he said:

Divisions may spring up, ill blood may burn, parties be formed, and interests may seem to clash; but the great bonds of the nation are linked to what is past. The deeds of the great men, to whom this country owes its origin and growth, are a patrimony, I know, of which its children will never deprive themselves.

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79 See Forgé, supra note 46, at 15-20.
80 See generally Forgé, supra note 46, at 159-78.
81 Edmund Quincy, Where will it End?, 1 Atlantic Monthly 239, 245 (1857), quoted in Forgé, supra note 46, at 176.
82 Letter from Chancellor James Kent to Justice Joseph Story, supra note 1.
83 See Forgé, supra note 46, at 13-16.
84 1 Edward Everett, Orations and Speeches on Various Occasions 35 (1836), quoted in Forgé, supra note 46, at 164.
This gigantic task was complicated by their sense of themselves as "a pygmy race." It cannot be surprising that the post-heroic generation, thinking itself a poor substitute for the greatest generation, would avoid revisiting the judgments of the Fathers. Instead they adopted "a peculiarly deferential mentality" with respect to the Fathers. Thus their solution to the first problem was to abandon the science of politics, which might require boldness and judgment resembling those of the Fathers. Instead they clung to the sacred words of the great canonical documents to solve the myriad problems of the young republic.

"It is by constant recurrence to the first principles of our government, and the upright character of her earlier statesmen, that our glorious Union is to be nurtured and preserved," according to one contemporary commentator. The anti-slavery senator Charles Sumner stated on the floor of Congress: "Every Constitution embodies the principles of its framers. It is a transcript of their minds. If its meaning in any place is open to doubt . . . we cannot err if we turn to the framers." It could never be forgotten that the patrimony left by the Fathers had been "purchased with PRECIOUS BLOOD," like salvation itself in Christian belief. The filial pieties

\[\text{\textsuperscript{85} See Letter from Chancellor James Kent to Justice Joseph Story, }\textsuperscript{supra} \text{ note 1.}\]

\[\text{\textsuperscript{86} FORGIE, }\textsuperscript{supra} \text{ note 46, at 7-8.}\]

\[\text{\textsuperscript{87} The canonical, and even religious, stature that the Constitution has assumed in the years since its ratification has been discussed by others. See, e.g., Robert A. Burt, }\textit{Constitutional Law and the Teaching of the Parables}, 93 }\text{YALE} \text{L.J. 455, 467, 474 (1984) (comparing Constitutional exegesis to the exegesis of the biblical parables); Thomas C. Grey, }\textit{The Constitution as Scripture}, 37 }\text{STAN.}\text{L. REV.} 1 (1984) (describing the sacralization of the Constitution); Sanford Levinson, }\textit{"The Constitution" in American Civil Religion}, 1979 SUP. CT. REV. 123, 130 (exploring "the implications of religious analogies for understanding the role of the Constitution within American civil religion").\]

\[\text{\textsuperscript{88} FORGIE, }\textsuperscript{supra} \text{ note 46, at 8-9.}\]

\[\text{\textsuperscript{89} 26 }\text{THE UNITED STATES MAGAZINE, AND DEMOCRATIC REVIEW} 1, 191 (1850), }\textit{quoted in} \textsuperscript{supra} \text{ note 46, at 8.}\]

\[\text{\textsuperscript{90} CONG. GLOBE, 39th Cong., 1st Sess. 677 (1866), }\textit{quoted in} \textsuperscript{Powell, supra} \text{ note 8, at 947.}\]

\[\text{\textsuperscript{91} FORGIE, }\textsuperscript{supra} \text{ note 46, at 9 (quoting Address of the Bunker Hill Monument Ass'n to the Selectmen of the several Towns in Massachusetts (Oct. 1, 1824), in George Washington Warren, }\textit{The History of the Bunker Hill} \text{ monument).}\]
due the Fathers transcended mere political deference and rose to the level of religious obligation.

Thus was the science of politics abandoned and the hermeneutics of the sacred text exalted. This in turn presented the second problem. The sacredness of the text arose from the status of the Fathers who framed it. But what if those great men had clay feet? The issue that most vexed the post-heroic generation was itself the best evidence of the faults of the Fathers. At a minimum, the vast gap between the fine rhetoric of the Declaration of Independence and the reality of slavery suggested no small hypocrisy on the part of those with a hand in each.

The post-heroic generation handled the matter in a manner well familiar to every psychoanalyst. They simply denied it. That the gods were virtuous could not be doubted. That they were hypocrites in this or any respect could not be asserted. In a Fourth of July oration in 1837, John Quincy Adams denied the Fathers' hypocrisy and claimed their support for his anti-slavery position.\(^2\) The gods, according to Adams, were on his side:

The inconsistency of the institution of domestic slavery with the principles of the Declaration of Independence, was seen and lamented by all the southern patriots of the Revolution; by no one with deeper and more unalterable conviction, than by the author of the Declaration himself. No charge of insincerity or hypocrisy can be fairly laid to their charge. Never from their lips was heard one syllable of attempt to justify the institution of slavery. They universally considered it as a reproach fastened upon them by the unnatural step-mother country [Great Britain], and they saw that before the principles of the Declaration of Independence, slavery, in common with every other mode of oppression, was destined sooner or later to be banished from the earth.\(^3\)

\(^2\) John Quincy Adams, An Oration Delivered Before the Inhabitants of the Town of Newburyport, at Their Request, on the Sixty-First Anniversary of the Declaration of Independence 50 (July 4, 1837).

\(^3\) Id.
Adams' deft rhetorical tactic was to blame Great Britain for slavery,\(^{94}\) exonerate the Southern patriots of hypocrisy, and implicitly lay the charge of hypocrisy on those who, in the Post-Heroic Era, continued to support slavery.

The pro-slavery Taney also denied the Fathers' hypocrisy and, like Adams, implicitly claimed their endorsement of his position:

The general words above quoted\(^ {95}\) would seem to embrace the whole human family, and if they were used in a similar instrument at this day would be so understood. But it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration; for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted; and instead of the sympathy of mankind, to which they so confidently appealed, they would have deserved and received universal rebuke and reprobation.

Yet the men who framed this declaration were great men — high in literary acquirements — high in their sense of honor, and incapable of asserting principles inconsistent with those on which they were acting.\(^ {96}\)

Neither Adams nor Taney saw the issue the way the Fathers themselves saw it. Neither could tolerate the idea that the Fathers were hypocrites with respect to slavery and that it was precisely that hypocrisy that made the republic possible, politically and economically, in the first instance.\(^ {97}\) It would have been too gross a violation of their filial piety to acknowledge this simple fact. Instead, Adams and Taney each denied the historical record and

\(^{94}\) Justice McLean, dissenting in *Dred Scott*, similarly blamed Great Britain for introducing slavery into the colonies. See *Dred Scott*, 60 U.S. at 537 (McLean, J., dissenting).

\(^{95}\) *The Declaration of Independence* para. 2 (U.S. 1776) ("[A]ll men are created equal . . .").

\(^{96}\) *Dred Scott*, 60 U.S. at 410.

\(^{97}\) See MORGAN, supra note 51; see also BAILYN, supra note 51.
each invented a new one to service his own sense of piety and politics.

ORIGINALISM AND THE PRESERVATION OF PATRIMONY

By the 1850s, the post-heroic generation anticipated the catastrophe in which, despite Everett's exhortations, they might deprive themselves of their patrimony. Emulation of the Fathers and salvation of the republic converged in the ultimately irrational impulse to refer the contemporary crisis to the Fathers for resolution. The Fathers had communicated to their sons the solution to the political crisis by means of the canonical documents they had left behind. It remained only for the sons to interpret those documents correctly. The idea that dead ancestors communicate with the living is an essential aspect of primitive religion and of ancestor worship. Often such "communication" includes advice. By that definition, by cleaving to the sacred words of the Fathers and searching therein for a way to avoid the impending crisis, the post-heroic generation was indeed engaging in a form of ancestor worship.

Thus, Taney's historical premise in *Dred Scott*, that the language of the Declaration of Independence was not intended at the time of its drafting to embrace persons of African descent was not the considered judgment of even an amateur historian. It was a statement of filial piety rising to the level of religious faith, an instance of the ancestor worship common to the post-heroic generation.

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98 *Everett*, supra note 85, at 35, quoted in *Forgie*, supra note 46, at 164.
99 *Forgie*, supra note 46, at 6-8.
100 See id. at 8-9; see also Burt, *supra* note 88, at 467; Grey, *supra* note 88, at 3, 17-18.
101 See Lyle B. Steadman et al., *The Universality of Ancestor Worship*, 35 *Ethnology* 63, 63-64 (1996); see also Dean Shells, *Toward a Unified Theory of Ancestor Worship: A CROSS-CULTURAL STUDY*, 54 *Social Forces* 427, 427 (1975) ("Descent type, conjugal formation and marriage type were . . . to be the antecedents of ancestor worship with each of these, in turn, being a function of the pattern of subsistence (agricultural level).”).
102 See Steadman et al., *supra* note 102, at 65-70, 72.
103 *Dred Scott*, 60 U.S. at 410.
Taney's filial piety extended beyond the Declaration of Independence to the Constitution. The duty of the Court in *Dred Scott*, according to the Chief Justice, was "to interpret the instrument they have framed [the Constitution]... as we find it, according to its true intent and meaning when it was adopted." Under this rule of construction, historical change could not be taken into account. The great political and constitutional issue of the 1850s must, under this rule, be referred to the 1780s for decision. The present was expressly denied. The status quo ante could never under this theory be "ante." It replaced the present:

No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race, in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument [the Constitution] was framed and adopted. Such an argument would be altogether inadmissible in any tribunal called on to interpret it. If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption. It is not only the same in words, but the same in meaning, and delegates the same powers to the Government, and reserves and secures the same rights and privileges to the citizen; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day.

In a manner consistent with the prevailing rhetorical style of the time, Taney prefaced his detailed, and largely incorrect, historical analysis with the following assurance to his reader, "What the construction [of the Constitution] was at that time, we

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104 *Dred Scott*, 60 U.S. at 405.
105 *Id.* at 426.
think can hardly admit of doubt." The Chief Justice then launched into a lengthy discussion of the legal and political rights of free black men in the American states during the late 1780s when the Constitution was written and ratified. Taney's "usable past" was refuted, point by point, by Mr. Justice Curtis in a dissenting opinion. According to modern historians, Curtis was the better historian. The mere existence of Curtis' historical record disproves Taney's other rhetorical premise, that the matter was free from doubt.

The Taney-Curtis debate appears to be precisely the stuff constitutional originalists would endorse. Together, these two Justices plumbed the depths of a carefully selected historical record, searching for a true understanding of a static past that, in their view, became the constitutional present. The details of the historical debate between Taney and Curtis have been discussed at length by others. Putting aside historical detail, however, it appears that Curtis was intent upon driving the debate concerning the legal ramifications of slavery in the direction of status. To the extent that slavery could be characterized as an issue of status, akin, to some extent, to marriage, then the issue would be more obviously suitable for resolution on a state-by-state basis. Taney took a different approach, attempting successfully to drive the debate in the direction of property. To the extent that slavery

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106 Dred Scott, 60 U.S. at 426.
107 Id. at 403-26.
112 Dred Scott, 60 U.S. at 583-86, 590-604, 624-26 (Curtis, J., dissenting). It is worth noting that Curtis italicized the word "status" every time he used it in his opinion.
113 Id. at 624-25.
114 Id. at 450-52 (majority opinion).
could be characterized as an issue of property, then the rights of the property holder would be protected against federal intervention by the Due Process and Takings Clauses of the Fifth Amendment to the United States Constitution. This was the rhetorical strategy that was later denounced by conservative commentators as the first invocation of the modern doctrine of substantive due process.

Taney's success in framing the debate as one of property rights, together with the possibility that the federal Constitution might be applied to restrict states' authority to limit the rights of slave holders bringing slaves into free states, invoked the fear that the "Slave Power" might successfully invade the Northern states and bring about the death of free labor by a thousand small cuts.

Mr. Justice Curtis made no formal methodological statement in his dissent. Like Taney and Adams, Curtis rejected the assertion that the Fathers could be held accountable for hypocrisy. But he characterized this as "[m]y own opinion," and insisted that "this is not the place to vindicate their memory." Even so, his method was similar to Taney's inasmuch as it was implicitly based on the constitutional status quo as it existed in 1789 and on the historical context of that period as he described it. His selection of materials from the historical record was quite different from Taney's selection, and that is the reason Curtis implicitly offers for his differences with Taney.

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115 *Dred Scott*, 60 U.S. at 450-52.
117 *Dred Scott*, 60 U.S. at 450-52.
118 For a detailed analysis of Justice Curtis' opinion, see Maltz, supra note 111, at 2005-14. Professor Maltz is a member of the present Symposium panel.
119 *Dred Scott*, 60 U.S. at 574-75 (Curtis, J., dissenting).
120 Id. at 574.
121 Id. at 575.
122 Id. at 574-88, 604-33.
123 Compare id. at 408-22 (majority opinion), with id. at 571-633 (Curtis, J., dissenting).
But while Taney and Curtis debated the contents of this historical record, a different debate took place between Taney and Curtis, on the one hand, and the aging Justice McLean on the other. Their debate focused implicitly on the uses of the historical record, rather than its content.\textsuperscript{124} Mr. Justice McLean's approach to constitutional jurisprudence was different from Taney's in an important way. McLean did not, like the majority of his brethren, abandon the science underlying the constitutional text, nor did he consider himself bound by the text in the same manner as his colleagues did.\textsuperscript{125} He embraced the Federalist Papers, and thus implicitly embraced the science on which they were based, as authority for an analytic approach to the Constitution.\textsuperscript{126} Thus with respect to the Court's holding that Scott, as a man of African heritage, could not be a citizen, McLean counseled a more philosophical approach drawn from Publius himself, from contemporary law, and, it would appear, from natural law:

I prefer the lights of Madison, Hamilton, and Jay, as a means of construing the Constitution in all its bearings, rather than to look behind that period, into a traffic which is now declared to be piracy, and punished with death by Christian nations. I do not like to draw the sources of our domestic relations from so dark a ground.\textsuperscript{127}

McLean's Christian philosophy was apparent in his opinion. Slaves were persons in the eyes of God: "A slave is not a mere chattel. He bears the impress of his Maker, and is amenable to the laws of God and man; and he is destined to an endless existence."\textsuperscript{128} McLean's Christianity determined, to some extent, his opinion in \textit{Dred Scott}.

With respect to the Court's other principal holding, that the section of the Missouri Compromise that prohibited slavery in certain of the territories was unconstitutional, McLean adopted a different approach:

\textsuperscript{124} \textit{Dred Scott}, 60 U.S. at 537-48 (McLean, J., dissenting).
\textsuperscript{125} Id. at 536-47.
\textsuperscript{126} Id. at 537.
\textsuperscript{127} Id.
\textsuperscript{128} Id. at 550.
What do the lessons of wisdom and experience teach, under such circumstances, if the new light [the assertion that Congress lacks authority to ban slavery in the territories], which has so suddenly and unexpectedly burst upon us, be true? Acquiescence; acquiescence under a settled construction of the Constitution for sixty years, though it may be erroneous; which has secured to the country an advancement and prosperity beyond the power of computation.  

The case for acquiescence was particularly strong when the questioned interpretation was "'accompanied by indications, in different modes, of a concurrence of the general will of the nation.'"  

Thus with respect to the issue of the slave's personal rights, McLean adopted a position grounded in contemporary notions of natural law. With respect to the architecture of government, and in particular the scope of the authority of Congress, he adopted a pragmatic approach. And it cannot be ignored that he also, with respect to other issues, applied an originalist approach similar to that of his colleagues. He implicitly rejected his brethren's position that one interpretative approach ought to be applied to all constitutional issues. His flexible approach did not win the day.  

Taney, Curtis, and many others of their generation identified more or less rigidly with the Fathers and acted, in their judicial capacities, to resolve the great issue of their generation as if by the Fathers themselves. Their position, while on its face based on the historical record, was nevertheless profoundly antihistorical inasmuch as it ignored or, perhaps more accurately, wished away historical change. It was also, paradoxically, at variance with the intent and practice of the founding generation.

129 Dred Scott, 60 U.S. at 546.  
130 Id. (quoting James Madison, message to the Senate, January 1815). Compare this to Taney's explicit denial that contemporary political opinion could serve as a basis for constitutional exegesis. See text accompanying note 107.  
131 Dred Scott, 60 U.S. at 547-57.  
132 Id. at 537-47.  
133 See, e.g., id. at 536-37.
It appears that the Fathers were not uniformly originalists. Clearly, Thomas Jefferson was not. He denied that one generation could govern a later generation and captured his rejection of the position that later became originalism in his famous dictum that "[t]he earth belongs in usufruct to the living."134 Professor Kent Greenfield has identified many "interpretive methodologies" applied by the members of the First Congress, many of whom were framers.15 For them, the intent of the Philadelphia framers was not determinative of constitutional meaning.136 Professor H. Jefferson Powell also analyzed the interpretive styles of courts in the early republic and of other important early commentary on the meaning of the Constitution.137 He concluded that, while the term "intent" was frequently used to describe interpretive methods, the modern meaning attached to that term did not appear as an important hermeneutical tool until approximately the time of the Civil War.138 This is consistent with Professor Kahn's work139 and with the argument of this article that the impulse to refer constitutional issues of threatening magnitude to the Fathers themselves, that is to say, originalism as it first appeared, arose at least in part as a result of the desperation of the post-heroic generation to avoid the dissolution of the republic.

15 Kent Greenfield, Original Penumbras: Constitutional Interpretation in the First Year of Congress, 26 CONN. L. REV. 79 (1993) (looking at the major debates of the First Congress, particularly the debates that dealt with constitutional interpretation and discussing the interpretive methodologies used during these debates).
136 Id. at 80-81. Greenfield identifies eight members of the House as members of the Constitutional Convention. Id. at 79 n.2. He does not include Senators in his count. Id.
137 See generally Powell, supra note 8.
138 Id. at 945-47. Powell identifies the modern meaning of originalism as the idea that "the 'original understanding at Philadelphia' should control constitutional interpretation." Id. at 948 (referring to Justice Rehnquist's dissent in Trimbble v. Gordon, 430 U.S. 762, 778 (1977) (Rehnquist, J., dissenting)).
139 See Kahn, supra note 63.
CONCLUSION

In their desperation to fulfill their filial duty to preserve the work of the Fathers, the Civil War generation in general, and the Taney Court in particular, referred the issue of slavery to the Fathers. This was precisely the issue the Fathers had bequeathed to their political progeny for resolution later. There is no small irony in this. If nothing else, it provides still more evidence of the inevitability of a cataclysmic reorganization of the republic, by more or less violent means, to resolve the issue of slavery. Since that time, originalism has developed into a considerably more sophisticated school of thought, with powerful adherents and divisions within itself over a number of issues. Disagreements have arisen over the authority of text, context, and tradition. Disagreements have also arisen over the relative authority of items in the historical record in discerning the true meaning, at the moment of constitutional consent, of the language of the document. Whether these developments redeem the doctrine from its inauspicious beginnings is a question for another day. In any event, one cannot fully understand the scope of Dred Scott without recognizing its originalism and its origins in the tense intergenerational relationship between the Fathers of our country and the first generation of sons.

141 See, e.g., Kesavan & Paulsen, supra note 6, at 1184-1214; Strauss, supra note 135, at 1726-27, 1748-50.